Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 78-53

WHIRLPOOL CORPORATION,

Petitioner,

vs.

LEWIS SIMPSON,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

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No.

WHIRLPOOL CORPORATION,

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LEWIS SIMPSON,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

Petitioner, Whirlpool Corporation, prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered in this case on April 10, 1978.

OPINIONS BELOW.

The Opinion of the Court of Appeals is unreported and is reproduced herein as Appendix A. The decision of the district court is reported unofficially at 15 FEP Cases 887 and is reproduced herein as Appendix B.

JURISDICTION.

The Opinion and Judgment of the Court of Appeals was entered on April 10, 1978 (Appendix A). This Court's jurisdiction is invoked under 28 U. S. C. § 1254(1).

QUESTION PRESENTED.

Whether the Sixth Circuit, in reversing the judgment of the district court, erred in finding that commencing proceedings before a state agency was not required before bringing a suit in federal court under the Age Discrimination in Employment Act of 1967, where there is a state agency empowered to handle such proceedings.

STATUTORY PROVISIONS INVOLVED.

The statutory provisions involved are relevant portions of the Age Discrimination in Employment Act of 1967, 29 U. S. C. §§ 626(d) and 633(b) (hereinafter referred to as the "ADEA") and are reproduced in Appendix D. In particular, § 633(b) provides,

> "In the case of an alleged unlawful practice occurring in a State which has a law prohibiting discrimination in employment because of age and establishing or authorizing a State authority to grant or seek relief from such discriminatory practice, no suit may be brought under section 626 of this title before the expiration of sixty (60) days after proceedings have been commenced under the State law, unless such proceedings have been earlier terminated. . . ."

Other relevant statutory provisions involved are Title VII of the Civil Rights Act of 1964 as amended, 42 U. S. C. § 2000e-5(c), and the Kentucky Fair Employment Practices Act, Ky. Rev. Stat., § 344.010 *et seq.*, and are also reproduced in Appendix D.

STATEMENT OF THE CASE.

This case raises the important threshold question of whether prior commencement of proceedings with the appropriate state agency is required before the filing of a federal court suit under the Age Discrimination in Employment Act of 1967, 29 U. S. C. § 621 *et seq.* (ADEA).

Petitioner, Whirlpool Corporation ("Whirlpool"), employed Respondent Lewis Simpson for twenty-five years before Simpson tendered his letter of resignation and then commenced retirement in January of 1975. Simpson resigned after receiving his 1974 performance report which indicated an unsatisfactory work level that was not commensurate with his fourteen years of experience in supervision with Whirlpool.

Thereafter, Respondent retained counsel, who, on his behalf, notified the Employment Standards Administration of the United States Department of Labor that Simpson intended to bring an action against Whirlpool under the ADEA. On May 8, 1975, a conciliation conference between the parties was held, but voluntary settlement of the case did not result at that time. At the end of the conference, the Department of Labor advised Simpson that he should exhaust his remedies under Kentucky state law before proceeding further in federal court.[1]

Prompted by this advice, Simpson and his counsel met, later that very day, with the director of the Division of Labor Standards of the Kentucky Department of Labor. The director advised them that the Kentucky Equal Employment Act was administered by the State Human Rights Commission, and that

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1. The Kentucky Fair Employment Practices Act, Ky. Rev. Stat. § 344.010 *et seq.* (App. D) considers age discrimination an unlawful employment practice, and creates a state agency, the Kentucky Commission on Human Rights, to grant or seek relief from such practices.

proceedings would have to be instituted before that agency.[2] Simpson called the Kentucky Commission on Human Rights but did not file a written complaint as required. Accordingly, the agency could not process and, therefore, did not issue its standard written order of termination for any proceedings concerning Simpson.

Nevertheless, on June 23, 1975, Simpson filed the instant federal court suit. Whirlpool moved to dismiss the complaint on the basis of the Plaintiff's failure to file with the state agency. That motion was granted by Chief Judge Moynahan in a Memorandum Opinion filed December 29, 1975 (Appendix B). Quoting *Goger* v. *H. K. Porter*, 492 F. 2d 13 (3d Cir. 1974), the court agreed that " 'the Congressional intent that state agencies be given the initial opportunity to act *should be strictly followed.*' 492 F. 2d at 17" 15 FEP Cases at 888; App. B at A4 [Emphasis in district court order]. Simpson's "non-compliance with the clear statutory mandate" was "a fatal jurisdictional defect." 15 FEP Cases at 888; App. B. at A4.

Upon leave granted by the court, Simpson subsequently deposed the Director of the Kentucky Commission on Human Rights who confirmed that the Plaintiff had not commenced any proceedings before that agency. On that basis, Chief Judge Moynahan dismissed the action.

On appeal, the Court of Appeals for the Sixth Circuit, on April 10, 1978, reversed the decision of the district court and held that resort to the state agency was not required by the ADEA. The court's brief opinion was based solely upon its decision three days earlier in *Gabriele* v. *Chrysler Corp.*, 573 F. 2d 949 (6th Cir. 1978) (App. C) which held that prior commencement of proceedings with the appropriate state agency

2. Proceedings before the Kentucky Commission on Human Rights are commenced with the filing of a written sworn complaint with the agency. The Commission has, since 1966, accepted written complaints and attempted conciliation with respect to complaints of employment discrimination on the basis of age. The agency encourages individuals who contact it to commence proceedings by filing a complaint.

was not required before the filing of a federal court suit under the ADEA.

REASONS FOR GRANTING THE PETITION FOR WRIT OF CERTIORARI.

I. The Sixth Circuit's Decision Is in Conflict with the Prior Decisions of Four Other Courts of Appeals.

The Sixth Circuit, in *Gabriele*, discussed but then rejected the holding of the first and leading case on the state deferral requirement, *Goger* v. *H. K. Porter Co.*, 492 F. 2d 13 (3d Cir. 1974). In *Goger*, the Third Circuit agreed with the district court that initial recourse to a state agency to provide an opportunity for conciliation was required by § 633(b) of the ADEA.

> "We agree with the district court, however, that although the Act does not require an aggrieved person to exhaust state remedies as a condition precedent to the institution of a federal suit, it does require that the State be given a threshold period of sixty days in which it may attempt to resolve the controversy, normally by voluntary compliance." 492 F. 2d at 15.

In rejecting the Third Circuit's *Goger* opinion, the Sixth Circuit did not even cite the identical conclusion reached by the Ninth Circuit in *Curry* v. *Continental Airlines*, 513 F. 2d 691 (9th Cir. 1975). There, that court held:

> "[W]e concur in the reasoning of those courts that have held decisions interpreting 42 U.S.C. § 2000e-5(b) [as amended 42 U.S.C. § 2000e-5(c)] . . . to be generally applicable for purposes of interpreting § 633(b). [Citation omitted.] 'The minor differences between § 633 and its counterpart under the 1964 Act are insignificant and provide no support for an interpretation of the former which is contrary to' interpretations of the latter. *Goger, supra*, at 16." 513 F. 2d at 693. [Footnote omitted.]

Furthermore, and probably unknown to the Sixth Circuit when it issued the *Gabriele* decision on April 7, 1978, the

Eighth and Ninth Circuit Courts of Appeals had each issued an opinion earlier that week which agreed with *Goger* and *Curry* and were directly opposite the Sixth Circuit's *Gabriele* position. Specifically, on April 4, 1978, in *Reich* v. *Dow Badische Co.*, No. 76-7637, ... F. 2d ....., 17 FEP Cases 363 (2d Cir. April 4, 1978), the Second Circuit held that the deferral requirement to the state agency was mandatory under the ADEA and, therefore, affirmed the district court's dismissal of the complaint. The very next day, in *Evans* v. *Oscar Mayer & Co.*, No. 77-1692, ... F. 2d ....., 17 FEP Cases 221 (8th Cir. April 5, 1978), the Eighth Circuit held that the congressional intent that discrimination on the basis of age be remedied as quickly and effectively as possible would be best served by giving the Secretary of Labor and the state agency an initial attempt at conciliation before the commencement of a protracted federal court proceeding.

Yet, faced with two circuit courts of appeals decisions mandating state deferral and, most likely unaware of the yet two more circuit decisions which analyzed the statutory language and agreed with the first two, the Sixth Circuit reached a contrary conclusion. Sensing the need to defend its position against charges of "judicial legislation," the Sixth Circuit characterized its action as not " 'judicial legislation' but rather . . . a judicial harmonization of a statutory package which is admittedly less than a model of clarity." 573 F. 2d at 955, App. C at A15.

Yet, whatever the characterization, the fact remains that the Sixth Circuit has rewritten the statutory language of § 633(b) of the ADEA in direct, clear and unequivocal conflict with the Congressional intent and the interpretation of the law by four other courts of appeals which have decided this issue. If allowed to stand, this decision will create two different and inconsistent jurisdictional standards for individual suits under the ADEA.

II. The Sixth Circuit's Decision That a State Agency Is Not Entitled to Attempt Conciliation Before a Plaintiff Can Resort to Federal Court Seriously Misconstrues the Express Language of the ADEA.

The Sixth Circuit's opinion in this case was based squarely on *Gabriele*. In *Gabriele*, that court addressed this "narrow but important question" of state deferral. 573 F. 2d at 952, App. C at A8. First, the court concluded that a mandatory deferral requirement should not be read into the ADEA despite the facial similarity between ADEA, 29 U. S. C. § 633(b) and the mandatory deferral requirement under Title VII of the 1964 Civil Rights Act, 42 U. S. C. § 2000e-5(c). The principal reason for the difference was the court's belief that the ADEA, unlike Title VII, allows a federal action, once commenced, to "supersede any state action." This provision, the court believed, demonstrated less deference to state procedures.

A second distinction between § 2000e-5(c) and § 633(b) was that Title VII provides that "no charge may be filed . . . before the expiration of sixty days," while the ADEA provides that "no suit may be brought . . . before the expiration of sixty days." This difference, allowing charges to be filed immediately under the ADEA but not under Title VII, was interpreted as further evidence of less deference to state procedures under the ADEA. Third, there is a possibility of concurrent administrative action by the state agency and the Department of Labor under the ADEA. This, too, was interpreted as a further basis for giving less deference to the state procedures. Finally, the court based its decision on the general remedial purposes of the legislation, which it felt would be burdened by forcing an employee to go to a state agency.

Nevertheless, the Sixth Circuit's decision was "judicial legislation" at its worst. In 1967 when Congress passed the ADEA, it decided what it believed would be the preferable and most efficient procedure for settling age discrimination cases. That

procedure provided for both the Department of Labor *and* a state agency to have the opportunity to settle a charge. The Sixth Circuit, however, terming the district court's dismissal in *Gabriel*, a "draconian result," 573 F. 2d at 954, App. C at A13, rewrote the congressional charge handling procedure solely to accommodate an employee who had failed to fulfill the requirements of the Act. In doing so, the court sacrificed the increased potential of informal conciliation by state agencies for the benefit of a negligent federal court plaintiff.

Judge Lively concurred in *Gabriele* for reasons not in issue here, but expressly rejected the reasoning of the majority opinion that a complainant may elect to begin an action in federal court without resorting to an available state agency. He believed that giving a state agency the opportunity "to attempt a solution by conciliation" was "compatible with expressed Congressional concerns for harmonious state-federal regulations in the national enterprise of eliminating unlawful discrimination in employment." 573 F. 2d at 956, App. C at A17.

The four other circuit courts have reached the same conclusion that Congress intended that the states be given the opportunity to resolve age discrimination cases before federal litigation. The Eighth Circuit in *Evans* explained the appropriate procedure:

> "Congress clearly intended that discrimination on the basis of age be remedied as quickly and efficiently as possible . . . . Section 626(d) of the ADEA expressly requires the claimant to notify the Secretary of Labor before filing suit and requires the Secretary [to engage in conciliation] . . . . [Congress] rejected a proposed enforcement procedure that would have subjected ADEA complaints to the same delays that plague the EEOC and NLRB. [Citation omitted.] Instead, the claimant need defer to the Secretary of Labor and the state agency for only sixty days before bringing suit. Thus, in those cases in which the Secretary of Labor or the state agency is able to provide speedy relief, the claimant can escape the delay inherent in any federal court action. On the other hand, if prompt relief cannot be obtained, the claimant may bring an action after waiting only sixty days. Requiring a claimant to seek relief through a state agency designed specifically to handle this type of case is consistent with congressional intent. It increases the chances of conciliation while creating no additional delay, for the sixty-day period of deference to the state agency may run concurrently with the sixty-day period of deference to the Secretary of Labor." ..... F. 2d ....., 17 FEP Cases at 223.

Likewise, the Second Circuit in *Reich*, explained:

> " 'Deference' to state procedures where they exist is fundamental to the ADEA structure.
>
> * * * * *
>
> "Much of Appellant's argument mistakenly proceeds on the tacit premise that resort to the state remedy is a technical step devoid of substantive content, and that, therefore, the slightest showing will warrant setting the bar of Section 633(b) aside. That ignores the paramount circumstances, that the state remedy, or rather remedies, presented appellant with a full and adequate system of relief, and that there was no reason for turning to the federal remedy that did not equally direct the appellant to the state remedies, and that the scheme of the ADEA very explicitly requires that the grievant timely present his claim to the state authority before suing." ..... F. 2d ....., 17 FEP Cases at 367-368.

The Second Circuit in *Reich* also noted that:

> "Failure to meet the sixty-day notice requirements . . . does not extinguish the employee's substantive right; it does terminate the individual's right to commence a private civil action in his own name, but the Secretary retains the right to sue to enforce the grievant's rights wholly without reference to the notice requirements." [Citation omitted.] ..... F. 2d ....., 17 FEP Cases at 365.

Thus, the Sixth Circuit was clearly wrong in its fear of a "draconian result," 573 F. 2d at 954, if a charging party is

forced to comply with the Act. The Secretary of Labor can still bring suit. Thus, a delinquent charging party can have his case heard in federal court. Moreover, as the Congress had planned, this procedure can be followed without sacrificing the possibility of conciliation at the state level. In this light, the conclusions reached by the Third Circuit in a case affirming *Goger* bear repeating. "Private lawsuits are secondary to administrative remedies and suits by the Secretary of Labor." *Rogers* v. *Exxon Research Engineering Co.*, 550 F. 2d 834 at 841 (3rd Cir. 1977), *cert. denied*, No. 76-1451, ... U. S. ....., 98 S. Ct. 749 (January 9, 1978).

The wisdom of the congressional approach is evident from a statistical analysis of ADEA complaints. The number of complaints received by the Department of Labor increased from 1,000 in fiscal 1969 to more than 5,300 in fiscal year 1976 and even more in fiscal year 1977. *Report of Secretary of Labor to Congress pursuant to Section 13 of the ADEA* (1977). With the mandatory deferral procedures now in use, "about 80%" of the complaints are settled at the administrative level. *Statement on Age Discrimination Before the Subcommittee on Retirement Income and Employment of the House Select Committee on Aging*, 95th Cong. 1st Sess. (statement of Solicitor of Labor William J. Kilberg).

CONCLUSION.

The decision of the Sixth Circuit in *Gabriele*, as adopted in the instant case, is in self-pronounced conflict with the Third Circuit's decision in *Goger*. It is also in direct conflict with the Ninth Circuit's decision in *Curry*, the Eighth Circuit's decision in *Evans*, and the Second Circuit's decision in *Reich*. This case thus raises a vital threshold question as to the most appropriate procedure for obtaining swift and efficient relief from the problem of age discrimination.

For the foregoing reasons, Petitioner prays that a Writ of Certiorari be issued to review the judgment and decision of the United States Court of Appeals for the Sixth Circuit in this case.

Respectfully submitted,

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APPENDIX A.

No. 76-2195

UNITED STATES COURT OF APPEALS

For the Sixth Circuit

LEWIS SIMPSON,
Plaintiff-Appellant,

vs.

WHIRLPOOL CORPORATION,
Defendant-Appellee.

ORDER

Before: CELEBREZZE, ENGEL, and KEITH, *Circuit Judges.*

This appeal presents several important issues under the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. §§ 621-34. The district court dismissed appellant's ADEA complaint on the ground that he had failed to commence proceedings with the Kentucky State agency charged with enforcement of state age discrimination laws before filing this lawsuit. The district court held that such prior resort to the state agency was required by 29 U.S.C. § 633(b). This Court rejected such finding in *Gabriele* v. *Chrysler Corp.*, ... F.2d ..... (6th Cir. 1978), No. 76-2265.

For the reasons set forth in *Gabriele,* the judgment of the district court is reversed and the cause is remanded to the district court for further proceedings consistent with this Court's opinion in *Gabriele.*

It is so ordered.

Entered by Order of the Court
/s/ JOHN P. HELMANN
Clerk

APPENDIX B.

U. S. DISTRICT COURT,

Eastern District of Kentucky

Simpson v. Whirlpool Corporation,

No. 75-71, December 29, 1975

BERNARD T. MOYNAHAN, *Chief Judge*:—This age discrimination case is presently before the Court upon a motion to dismiss filed by the defendant, Whirlpool Corporation.

The pending motion is grounded on the allegation that plaintiff has failed to exhaust his state administrative remedies as required by §14(b) of the Federal Age Discrimination in Employment Act of 1967, 29 U.S.C. § 633(b).

Section 14(b) of the Act reads in pertinent part as follows:

> "(b) In the case of an alleged unlawful practice occurring in a state which has a law prohibiting discrimination in employment because of age and establishing or authorizing a state authority to grant or seek relief from such discriminatory practice, no suit may be brought under § 7 of this Act before the expiration of sixty (60) days after proceedings have been commenced under the state law, unless such proceedings had earlier terminated . . .".

As the above-quoted statutory provisions demonstrate in an age discrimination action brought in Kentucky, an employee must commence proceedings under Kentucky laws prohibiting age discrimination,[1] and those proceedings must be in progress for at least sixty (60) days before plaintiff may file his notice

1. Kentucky Revised Statutes 344.010(4), 344,020(b), 344,180, and 344,190; define discrimination in employment on the basis of age; announce the purpose of the law as guarding against such discrimination; and provide the machinery, via the Kentucky Commission on Human Rights, to prevent unlawful employment practices.

with the Secretary of Labor in preparation for bringing suit. The failure to comply with this prerequisite prohibits the maintenance of an action under this Act. See *Vaughn* v. *Chrysler Corp.*, 382 F.Supp. 143, 145 (E.D. Mich. 1974).

Although the plaintiff has neither alleged nor demonstrated that he filed with the Kentucky Commission on Human Rights a charge of age discrimination concerning his discharge from defendant's employ, plaintiff has established by affidavit that he and his attorney contacted a representative of the Kentucky Department of Labor, who in turn contacted an office of the Kentucky Department of Human Relations.[2] The plaintiff's affidavit goes on to state that a phone call was received by his counsel wherein the Director of the Louisville, Kentucky office of the Kentucky Department of Human Relations advised plaintiff's counsel that, in light of defendant's refusal to undertake any compromise of the claim, nothing could be done by the Commonwealth of Kentucky. Plaintiff's counsel was further advised that plaintiff was free to pursue his federal remedy.

In considering whether equitable considerations might excuse a plaintiff who may have justifiably relied, to his or her detriment, upon official advice in neglecting to exhaust available state remedies, the Court notes that the only apposite case found excusing such negligence, *Goger* v. *H. K. Porter Co.*, 492 F. 2d 13 (3rd Cir. 1974), expressly limited its ruling to the peculiar facts before it. The Court rationalized that the remedial nature of the Act and the absence of any known judicial decision construing § 14(b) of the Act during the relevant period dictated that the plaintiff be allowed a hearing on the merits of his claim. Significantly, the Court saw fit to engraft into its opinion the following caveat:

> "In the future however, we think the Congressional intent that state agencies be given the initial opportunity to act *should be strictly followed.*" 492 F.2d at 17 (Emphasis supplied).

2. Plaintiff in his affidavit is apparently referring to the Kentucky Commission on Human Rights.

It is readily apparent to this forum that the mere placing of a phone call to the state commissioner empowered to deal with plaintiff's grievance does not equate to the commencement of a *proceeding* with that body, as that term is embraced by the Act.

Moreover, the primary consideration motivating the Goger Court is not present here, as case law construing § 14(b) was reasonably available to plaintiff during the period in question.

Therefore, the fact that the plaintiff was informed by a representative of the Kentucky Commission on Human Rights that nothing could be done by the state, in light of defendant's alleged refusal to undertake any compromise of the claim, does not bring into play any equitable considerations that would excuse plaintiff's noncompliance with the clear statutory mandate, as buttressed by existing case law that proceedings must first be commenced with the appropriate state authorities.

On the basis of the foregoing, the Court holds that the plaintiff's failure to allege in his complaint or to demonstrate by affidavit that he made the necessary filing with the Kentucky Commission on Human Rights constitutes a fatal jurisdictional defect leaving the Court no alternative but to dismiss the complaint pursuant to Federal Rule of Civil Procedure 12(h)(3), as it finds itself without jurisdiction to entertain same.[3]

An appropriate order shall this day be entered in conformity herewith.

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3. The Court feels compelled to view the pending motion as one for dismissal, rather than treating it as a Rule 56 motion, despite its consideration of plaintiff's affidavit. Federal Rule of Civil Procedure 12(d) provides for the resolution of preliminary questions of jurisdiction to include the obtainment of evidence relevant to the jurisdictional dispute, where, as here, the issue of jurisdiction is not entwined with the actual merits of the controversy. Schramm v. Oakes, 352 F. 2d 143, 149 (10th Cir. 1965); McBeath v. Inter-American Citizens for Decency Committee, 374 F. 2d 359 (5th Cir. 1967), cert. denied 389 U. S. 896; Firemen's Fund Insurance Company v. Railway Express Agency, 253 F. 2d 780 (6th Cir. 1958).

APPENDIX C.

No. 76-2265

U. S. COURT OF APPEALS
SIXTH CIRCUIT

CLEMENT GABRIELE,
Plaintiff-Appellant,

v.

CHRYSLER CORPORATION,
Defendant-Appellee.

APPEAL from the United States District Court for the Eastern District of Michigan, Southern Division.

April 7, 1978

Before EDWARDS, CELEBREZZE and LIVELY, *Circuit Judges.*

CELEBREZZE, Circuit Judge, delivered the opinion of the Court, in which Edwards, Circuit Judge, joined. Lively, Circuit Judge, (pp. 13-14) filed a separate concurring opinion.

CELEBREZZE, Circuit Judge. Plaintiff-appellant Clement Gabriele, a former employee of defendant-appellee Chrysler Corporation, filed an action in the district court alleging that his employment was terminated on the basis of age in violation of the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. §§ 621-34. The district court granted Chrysler's motion for summary judgment based upon Gabriele's failure to timely file an age discrimination complaint with the Michigan Civil Rights Commission (MCRC). 416 F. Supp. 666 (E.D. Mich. 1976). The principal issue raised on appeal is whether timely resort to an agency charged with enforcement of state

age discrimination laws is a prerequisite to filing suit under the ADEA in federal court.[1] We hold that the ADEA imposes no such prerequisite and reverse the judgment.

Gabriele was employed by Chrysler as an engineer from 1965 until he was laid off on May 9, 1975. On August 15, 1975, he filed a complaint with the MCRC alleging age discrimination.[2] On September 3, 1975, he was informed by the MCRC that it could not accept the complaint since it was not filed within ninety days of the alleged discriminatory act, as then required by Michigan law.[3] On November 6, 1975, he filed an action in the district court, alleging that the sixty-day advance notice of intent to sue, required by 29 U.S.C. § 626(d), had been given to the Secretary of Labor, which Chrysler does not contest. Thus, the notice to the Secretary of Labor was necessarily given within the 180-day period set forth in 29 U.S.C. § 626(d)(1).[4]

1. This Court expressly declined to resolve this issue in *Rucker* v. *Great Scott Supermarkets*, 528 F. 2d 393, 394 (6th Cir. 1976).

2. Michigan is a so-called "deferral state" in terms of 29 U. S. C. § 633(b) since it "has a law prohibiting discrimination in employment because of age." Mich. C. L. A. § 37.2202(1)(a), *replacing* Mich. C. L. A. § 423.303a(a), and the MCRC is authorized "to grant or seek relief from such discriminatory practice," Mich. C. L. A. § 37.2602(c)-(d), *replacing* Mich. C. L. A. § 423.307(a). *Eklund* v. *Lubrizol Corp.*, 529 F. 2d 247, 250 n. 4 (6th Cir. 1976); *Rucker* v. *Great Scott Supermarkets*, 528 F. 2d 393, 394 n. 3 (6th Cir. 1976).

3. Mich. C. L. A. § 423.307(b), *repealed by* P. A. 1976, No. 453, § 804, eff. March 31, 1977, which eliminates any statutory limit for filing with the MCRC, apparently leaving the issue to departmental regulations.

4. 29 U. S. C. § 626(d):

> No civil action may be commenced by any individual under this section until the individual has given the Secretary not less than sixty days' notice of an intent to file such action. Such notice shall be filed—
>
> (1) Within one hundred and eighty days after the alleged unlawful practice occurred, or
>
> (2) in a case to which section 633(b) of this title applies, within three hundred days after the alleged unlawful practice occurred or within thirty days after receipt by the individual of

(Footnote continued on next page.)

The district court held that the largely uncontested procedural history deprived it of jurisdiction since it read 29 U.S.C. § 633(b)[5] as mandating prior resort to an appropriate state agency before one could bring suit in federal court. It relied heavily upon cases which have held that provisions of the ADEA should be construed consistently with parallel language in Title VII of the Civil Rights Act of 1964. Noting that 42 U.S.C. § 2000e-5(c),[6] a Title VII provision parallel to § 633(b), has usually been

(Footnote continued from preceding page.)

> notice of termination of proceedings under State law, whichever is earlier.
>
> Upon receiving a notice of intent to sue, the Secretary shall promptly notify all persons named therein as prospective defendants in the action and shall promptly seek to eliminate any alleged unlawful practice by informal methods of conciliation, conference, and persuasion.

Gabriel does not need the benefit of the extended period set forth in § 626(d)(2).

5. 29 U. S. C. § 633(b):

> In the case of an alleged unlawful practice occurring in a State which has a law prohibiting discrimination in employment because of age and establishing or authorizing a State authority to grant or seek relief from such discriminatory practice, no suit may be brought under section 626 of this title before the expiration of sixty days after proceedings have been commenced under the State law, unless such proceedings have been earlier terminated; *Provided*, That such sixty-day period shall be extended to one hundred and twenty days during the first year after the effective date of such State law. If any requirement for the commencement of such proceedings is imposed by a State authority other than a requirement of the filing of a written and signed statement of the facts upon which the proceeding is based, the proceeding shall be deemed to have been commenced for the purposes of this subsection at the time such statement is sent by registered mail to the appropriate State authority.

6. 42 U. S. C. § 2000e-5(c):

> In the case of an alleged unlawful employment practice occurring in a State or political subdivision of a State, which has a State or local law prohibiting the unlawful employment practice alleged and establishing or authorizing a State or local authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, no charge may be filed under subsection (b) of

(Footnote continued on next page.)

interpreted to require prior resort to an appropriate state agency before a charge can be filed with the Equal Employment Opportunity Commission (EEOC), the district court imposed a similar requirement on ADEA suits. The court also relied upon cases from this Court which it read as making a timely filing of notice of intent to sue with the Secretary of Labor, § 626(d), a jurisdictional prerequisite to an ADEA suit in federal court. The district court finally noted that Congress must have been aware that some states had shorter filing periods under their age discrimination laws than the 180-day federal period and must have tacitly approved them when enacting the ADEA. This was said to justify the holding that one must not only first file a complaint with the appropriate state agency, but that filing must also be timely under state law, in order to proceed in federal court. The district court was not persuaded by arguments that its holding effectively turned the state filing limit into the federal filing limit, even though the former was only one-half of the latter.

Our research discloses a Third Circuit Court of Appeals decision which addressed the narrow but important question presented herein. *Goger* v. *H. K. Porter Co.*, 492 F. 2d 13 (3d Cir. 1974).[7] In *Goger*, relied upon by the district court, the court held that although § 633(b):

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> this section by the person aggrieved before the expiration of sixty days after proceedings have been commenced under the State or local law, unless such proceedings have been earlier terminated, provided that such sixty-day period shall be extended to one hundred and twenty days during the first year after the effective date of such State or local law. If any requirement for the commencement of such proceedings is imposed by a State or local authority other than a requirement of the filing of a written and signed statement of the facts upon which the proceeding is based, the proceeding shall be deemed to have been commenced for the purposes of this subsection at the time such statement is sent by registered mail to the appropriate State or local authority.

7. Goger was followed in *Rogers* v. *Exxon Research and Engineering Co.*, 550 F. 2d 834, 843-44 (3d Cir. 1977), cert. den.,— U. S. ..... (1978).

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> "does not require an aggrieved person to exhaust state remedies as a condition precedent to the institution of a federal suit, it does require that the State be given a threshhold period of sixty days in which it may attempt to resolve the controversy, normally by voluntary compliance." *Id.* at 15.

Its *ratio decidendi* was that § 633(b) was nearly identical to 42 U. S. C. § 2000e-5(c):

> "and courts have repeatedly interpreted the latter as requiring that appropriate state agencies be given a prior opportunity to consider discrimination complaints before resorting to the federal courts. " *Id.* at 15-16 (footnote omitted).

The court could not find anything in the ADEA's legislative history to justify a different interpretation of § 633(b). The court held, however, that equitable considerations in that case excused the plaintiff's failure to resort to the appropriate state

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The issue was discussed but not decided in *Hadfield* v. *Mitre Corp.*, 562 F. 2d 84, 87-88 (1st Cir 1977).

Many district courts have addressed the issue, *E.g.*, *Nickel* v. *Shatterproof Glass Corp.*, 424 F. Supp. 884 (E. D. Mich. 1976) (Joiner, J.) (timely filing not required); *Smith* v. *Jos. Schlitz Brewing Co.*, 419 F. Supp. 770 (D. N. J. 1976) (state filing not required); *Bertrand* v. *Orkin Exterminating Co.*, 419 F. Supp. 1123 (N. D. Ill. 1976) (dictum suggesting state filing not required); *Magalotti* v. *Ford Motor Co.*, 418 F. Supp. 430 (E. D. Mich. 1976) (Feikens, J.) (timely state filing not required); *Fitzgerald* v. *New England Tel. & Tel. Co.*, 416 F. Supp. 617 (D. Mass. 1976) (state filing required); *Bertsch* v. *Ford Motor Co.*, 415 F. Supp. 619 (E. D. Mich. 1976) (Pratt, J.) (state filing generally required but timely federal filing supports action); *Vasquez* v. *Eastern Air Lines, Inc.*, 405 F. Supp. 1353 (D. P. R. 1975) (state filing not required); *Skoglund* v. *Singer Co.*, 403 F. Supp. 797 (D. N. H. 1975) (timely state filing not required); *Vaughn* v. *Chrysler Corp.*, 382 F. Supp. 143 (E. D. Mich. 1974) (Kaess, J.) (state filing required but subject to equitable consideration); *McGarvey* v. *Merck & Co.*, 359 F. Supp. 525, (D. N. J. 1973), *vacated without opinion*, 493 F. 2d 1401 (3d Cir.) *cert. den.*, 419 U. S. 836 (1974) (state filing required).

See Annot., 24 A. L. R. Fed. 808, § 3[c].

agency and the case was remanded to the district court for a hearing on the merits.[8]

Judge Garth filed a concurring opinion in *Goger* in which he agreed that the case should be remanded for consideration of the merits of the complaint. He disagreed, however, that § 633(b)'s similarity to 42 U. S. C. § 2000e-5(c) mandated construing the two statutes similarly. He concluded "there is no requirement that a plaintiff must first attempt to utilize available state remedies before filing suit under the 1967 Act." *Id.* at 17. He approved the position taken there by the Secretary of Labor as *amicus curiae* that resort to a state agency is completely optional and that § 633(b)'s sixty-day waiting period applies only *if* one has chosen to pursue state relief.[9]

We agree with the reasoning of Judge Garth in *Goger* and reject the holding of the majority in that case.[10]

This Court has recognized the parallels between the ADEA and Title VII of the Civil Rights Act of 1964 but has also cautioned against blindly applying Title VII reasoning and results to ADEA cases. *Laugesen* v. *Anaconda Co.*, 510 F. 2d 307, 311-12 (6th Cir. 1975). Transferring the construction of 42 U. S. C. § 2000e-5(c) to § 633(b) is particularly inappropriate.[11] The two statutes are indeed very similar but neither is explicit on the question of whether resort to the appropriate state agency is required before beginning federal action.

8. The court's remand indicates that it did not consider prior resort to a state agency jurisdictional in the sense that absent such fact the district court would not have power to hear the case. Rather, it considered this requirement a statutory condition precedent to suit in federal court, subject to equitable considerations, *Bonham* v. *Dresser Industries, Inc.*, 569 F. 2d 187, 194 (3d Cir. 1977).

9. The Secretary of Labor as *amicus curiae* has taken the same position in this appeal.

10. Comment, *Procedural Prerequisites to Private Suit Under the Age Discrimination in Employment Act*, 44 U. Chi. L. Rev. 457 (1977).

11. Note, *State Deferral of Complaints Under the Age Discrimination in Employment Act*, 51 Notre Dame Lawyer 492 (1976).

Most courts that have read § 2000e-5(c) as requiring such prior resort have done so because Title VII's legislative history is very clear on that point. *Dubois* v. *Packard Bell Corp.*, 470 F. 2d 973, 975 (10th Cir. 1972); *Crosslin* v. *Mountain States Telephone & Telegraph Co.*, 422 F. 2d 1028, 1030-31 (9th Cir. 1970), *vacated and remanded*, 400 U. S. 1004 (1971); *EEOC* v. *Union Bank*, 408 F. 2d 867, 869-70 (9th Cir. 1968); *Stebbins* v. *Nationwide Mutual Insurance Co.*, 382 F. 2d 267, 268 (4th Cir. 1967), *cert. den.*, 390 U. S. 910 (1968); Eth*ridge* v. *Rhodes*, 268 F. Supp. 83, 89 (S. D. Ohio 1967). There is no similar legislative history accompanying § 633(b), so the rationale behind the prevailing interpretation of § 2000e-5(c) simply does not apply to § 633(b). Indeed there is legislative history suggesting that § 633(b) should be construed differently than § 2000e-5(c). A committee report accompanying the ADEA states that § 633 "provides for *concurrent* Federal and State actions . . .," H. R. Rep. No. 805, 90th Cong., 1st Sess. (1967), *reprinted in* 1967 U. S. CODE. CONG. AND ADMIN. NEWS 2213, 2218 (emphasis added), indicating that complaints could originate in either state or federal fora.[12] This is, of course, far from a clear indication that Congress intended § 633(b) to be construed differently than § 2000e-5(c). Our review of the legislative history of the ADEA is only meant to point out the absence of the kind of clear legislative history supporting the construction generally given § 2000e-5(c), thus necessitating consideration of other factors to support our result.

The principal reason we perceive for construing § 633(b) differently than § 2000e-5(c) is found in the language of § 633(a).[13] That provision states that once action is com-

12. Portions of the ADEA were patterned after the Fair Labor Standards Act, further demonstrating that the ADEA was not meant to be a mirror-image of Title VII. H. R. Rep. No. 805, 90th Cong., 1st Sess. (1967), *reprinted in* 1967 U. S. Code Cong. and Admin. News 2213, 2218.

13. 29 U. S. C. § 633(a).

> Nothing in this chapter shall affect the jurisdiction of any agency of any State performing like functions with regard to

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menced under the ADEA, it "supersede[s] any State action." Thus, even under Chrysler's view of this action, Gabriele could have totally cut off any state action he might have been required to initiate simply by waiting sixty days and beginning federal action. As Judge Garth said in *Goger*, we

> ". . . do not believe that it was the intent of Congress to require, prior to the institution of a Federal action, the commencement of a State proceeding which, under § 633(b), need not be concluded and which in any event would be superseded by the filing of the Federal action under § 633(a)." 492 F. 2d at 18.

Moreover, § 633(a) has no parallel in Title VII. Title VII also does not require exhaustion of state remedies but only the initiation thereof. *Crosslin* v. *Mountain States Tel. & Tel. Co.*, 422 F. 2d 1028, 1031 n. 5 (9th Cir. 1970), but Title VII has no provision for superseding state proceedings merely by beginning federal action. *Developments in the Law—Employment Discrimination and Title VII of the Civil Rights Act of 1964*, 84 Harv. L. Rev. 1109, 1212 (1971). The ADEA thus exhibits lesser deference to the states than does Title VII and gives us no compulsion to require state action as a prerequisite to an ADEA suit.

Another important distinction exists between § 633(b) and § 2000e-5(c). The latter states that "no charge may be filed" until after the sixty-day waiting period. This prevents all federal action during the waiting period, since filing of a charge with the EEOC is a prerequisite to a Title VII suit in federal court. The sixty-day period gives the appropriate state agency two months of exclusive jurisdiction over the discrimination allegation. Section 633(b), on the other hand, says "no suit may be brought" until after the sixty-day waiting period. This only prohibits the filing of a complaint in the district court and contemplates possible

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> discriminatory employment practices on account of age except that upon commencement of action under this chapter such action shall supersede any State action.

concurrent administrative action by the state agency and the Department of Labor. *Bonham* v. *Dresser Industries, Inc.*, 569 F. 2d 187, 194, n. 8 (3d Cir. 1977). The absence of a period of exclusive state jurisdiction under the ADEA is thus another indicia of lesser deference to the states under the ADEA than under Title VII. Again, this militates in favor of not requiring prior resort to a state agency before an ADEA suit in federal court.

Another reason for our conclusion is found in the general purposes of the ADEA. It is remedial legislation, designed "to promote employment of older persons based on their ability rather than age," 29 U. S. C. § 621(b), and is entitled to a liberal construction. *Moses* v. *Falstaff Brewing Corp.*, 525 F. 2d 92, 93-94 (8th Cir. 1975); *Skoglund* v. *Singer Co.*, 403 F. Supp. 797, 801 (D. N. H. 1975); *Woodford* v. *Kinney Shoe Corp.*, 369 F. Supp. 911, 914 (N. D. Ga. 1973). The interpretation of § 633(b) by the district court puts an unnecessary burden on all age discrimination complainants and worked a draconian result in this case.[14] The need for quick dispute resolution is acute in the ADEA context since the very cause of the alleged discrimination, age, grows daily. An older person should be allowed to choose the quicker of the two available remedies and not be forced to first choose the state remedy if that would unduly impede a prompt resolution of his grievance.

Chrysler argues that the district court properly relied upon several of this Court's decisions requiring a timely filing of notice of intent to sue with the Secretary of Labor, § 626(d), as a prerequisite to suit in federal court. Initially, we express doubts about the correctness of the reading of those cases by

14. Even the Third Circuit, whence came *Goger*, does not require a timely state filing if the state period is shorter than the federal 180 days. It recognized that this improperly turned the state filing period into the federal filing period. *Bonham* v. *Dresser Industries, Inc.*, 569 F. 2d 187, 194 (3d Cir. 1977). *Cf. Davis* v. *Valley Distributing Co.*, 522 F. 2d 827, 832-33 (9th Cir. 1975), cert. den., 429 U. S. 1090 (1977); *Olson* v. *Rembrandt Printing Co.*, 511 F. 2d 1228, 1232 (8th Cir. 1975) (both Title VII).

both Chrysler and the district court.[15] But even if we accept the idea that we have strictly construed § 626(d), that does not lead to a strict construction of § 633(b). The sections are meant to serve different purposes.

Chrysler finally argues that § 626(d)(2) precludes the result we reach here. That provision extends to 300 days, or thirty days after receipt of notification of termination of state proceedings, whichever is earlier, the time within which notice of intent to sue shall be filed with the Secretary of Labor. But it only does so "in a case to which section 633(b) . . . applies." Chrysler argues that if § 633(b) is interpreted to give an aggrieved

15. This Court's decisions construing § 626(d) have been cited, by Chrysler and others, for the proposition that a timely filing under § 626(d) is a strict jurisdictional prerequisite to suit in federal court. Close examination of those cases, however, reveals that that is not an accurate reading of them. The first case, *Hiscott* v. *General Electric Co.*, 521 F. 2d 632, 633-34 (6th Cir. 1975), did say that the notice requirement was "jurisdictional" but expressly refused to decide whether it could be treated like a statute of limitations which could be tolled or otherwise be subject to equitable considerations since the plaintiff's filing in *Hiscott* was not timely even if tolling doctrines were employed. The second case, *Ott* v. *Midland-Ross Corp.*, 523 F. 2d 1367, 1370 (6th Cir. 1975), merely cited *Hiscott* for the proposition that the § 626(d) filing was "jurisdictional." The last two cases, decided by the same panel on the same day, also relied upon *Hiscott* for the notion that § 626(d)'s requirement was a jurisdictional prerequisite to suit in federal court. *Eklund* v. *Lubrizol Corp.*, 529 F. 2d 247, 249 (6th Cir. 1976); *Rucker* v. *Great Scott Supermarkets*, 528 F. 2d 393, 394 (6th Cir. 1976). Both cases recognized, however, that appropriate facts could warrant relief from § 626(d)'s specific requirements. 529 F. 2d at 250; 528 F. 2d at 395. *See also* the opinions of then Judge, now Solicitor General, McCree in each case. 529 F. 2d at 250-51 (dissenting, on the grounds that equitable relief was warranted); 528 F. 2d at 395 (concurring, on the grounds that equitable relief was not warranted.) This demonstrates that these decisions use the term "jurisdictional" in the loose sense that § 626(d)'s requirements are a condition precedent to suit in federal court and not in the strict sense that noncompliance deprives the district court of power to hear the case, *Dartt* v. *Shell Oil Co.*, 539 F. 2d 1256, 1259-61 (10th Cir. 1976), *aff'd by an equally divided court*, ... U. S. ..... (1977), *Bonham* v. *Dresser Industries, Inc.* 569 F. 2d 187, 192 (3d Cir. 1977). *Cf. Reeb* v. *Economic Opportunity Atlanta, Inc.*, 516 F. 2d 924, 928, (5th Cir. 1975) (Title VII). *But cf. Powell* v. *Southwestern Bell Tel. Co.*, 494 F. 2d 485, 487-89 (5th Cir. 1974).

person an option to commence either state or federal action then the "anomalous result" is that one who deliberately bypasses the state agency still gets the benefits of the extended filing period merely by virtue of being in a "deferral state."[16] This possible result may or may not be "anomalous" but we believe it is incorrect in any event. One obtains the benefits of the extended filing period in § 626(d)(2) *only* if he is in a "deferral state" *and* elects to use that state's mechanisms to attempt a conciliation of the grievance. *Cf. Skoglund* v. *Singer Co.*, 403 F. Supp. 797, 803 (D. N. H. 1975). It is only if one uses time to let the state try its hand that he needs more time to notify the Secretary of Labor. Furthermore, any state filing need only be made within the minimum 180 days allowed for the federal filing, § 626(d)(1), in order to obtain the benefits of § 626(d)(2). *Cf. Olson* v. *Rembrandt Printing Co.*, 511 F. 2d 1228, 1232 (8th Cir. 1975) (Title VII). *Contra, Bonham* v. *Dresser Industries, Inc.*, 569 F. 2d 187, 192 n. 5 (3d Cir. 1977). To require the state filing to be timely under a shorter state period would improperly elevate state law over federal law. If the state filing is not timely under state law, presumably the complainant would not get the full 300 days to file with the Secretary of Labor since § 626(d)(2) also imposes a limit of within thirty days of receipt of notification of termination of state proceedings, if that is earlier than 300 days.[17] This will prevent undue manipulation of the filing limits by an aggrieved person.

Chrysler contends that this interpretation of §§ 633(b) and 626(d)(2) amounts to "judicial legislation." We disagree. Congress stated in § 626(d)(2) that the extended filing period applies only in cases "to which Section 633(b) . . . applies" and our construction of § 633(b) is that it does *not* apply if an aggrieved person does not elect to proceed with available state

16. See note 2, *supra*.

17. One obviously always has 180 days to notify the Secretary of Labor, pursuant to § 626(d)(1), even if § 626(d)(2) is applicable and thirty days elapse after he receives notice of termination of state proceedings before the 180 day period expires.

remedies. This is far from "judicial legislation" but rather is a judicial harmonization of a statutory package which is admittedly less than a model of clarity. This is a proper function for courts and one we are called upon to perform regularly.

We determine that 29 U. S. C. § 633(b) does not require prior resort to an available state agency as a prerequisite to an ADEA suit in federal court. Rather, it gives an aggrieved person the option of pursuing state remedies. If that option is elected, then the state agency must be given the required sixty days to attempt to reconcile the dispute before a suit can be filed in federal court, unless state proceedings are earlier terminated.[18] The election of first pursuing state remedies, permitted at any time within 180 days of the alleged discriminatory practice, is also required to take advantage of the extended filing period set forth in § 626(d)(2) regarding the notice of intent to sue given to the Secretary of Labor. If an aggrieved person does not elect to pursue available state remedies, then he may bring suit directly in federal court, subject to the sixty-day notice provision of § 626(d).[19]

The judgment of the district court is reversed and the cause is remanded for further proceedings consistent with this opinion.

Concurring Opinion

LIVELY, *Circuit Judge*, concurring: —I concur in the result, but am unable to accept all of the reasoning of the majority opinion. In particular, I am not persuaded that the legislative history of ADEA leads to the conclusion that a complainant in a "deferral state" may elect to begin an action in federal court without any resort to the state agency. The majority quotes a

18. If a suit is filed before the expiration of the sixty-day period, the district court need not dismiss the complaint but should hold the case in abeyance for the requisite period of time. *Cf. Mitchell* v. *Mid-Continent Spring Co.*, 466 F. 2d 24, 26-27 (6th Cir. 1972), *cert. den.*, 410 U. S. 928 (1973) (Title VII).

19. See notes 4 & 15, *supra*, concerning when that notice must be filed with the Secretary of Labor.

fragment from the House Report in support of this determination. However, when read in its entirety, the paragraph from which that quotation is taken leads me to the opposite conclusion. That paragraph reads:

> Federal-State relationship
>
> Section 14 provides for concurrent Federal and State actions, except that in States having laws prohibiting discrimination in employment because of age, no suit may be brought under this act before the expiration of 60 days after proceedings have been commenced under the State law (120 days during the first year after the effective date of the State law), unless such proceedings have been earlier terminated, and commencement of an action under this act shall be a stay on any State action previously commenced. H. R. Rep. No. 805, 90th Cong., 1st Sess. (1967), *reprinted in* 1967 U. S. Code. Cong. and Adm. News 2213, 2218-19.

The language following the word "except" in the above quotation denotes a Congressional deference to state agencies. This language, together with the "superseding clause" cited by the majority, 29 U. S. C. § 633(a), establishes a procedure under which a complainant in a deferral state must first initiate proceedings with the state agency, giving that agency 60 days in which to attempt a solution by conciliation, but is not required to continue to pursue state remedies after the expiration of that period. Such a construction is compatible with expressed Congressional concerns for harmonious state-federal regulations in the national enterprise of eliminating unlawful discrimination in employment practices. Statements of these concerns abound in the legislative history of both Title VII and ADEA.

However, untimely resort to the state agency for attempted conciliation should not deprive a claimant of his right to seek relief in a federal court where the state allows less than 180 days for filing. I would adopt the following language from the Third Circuit's opinion in *Bonham* v. *Dresser Industries, Inc.*, 569 F. 2d 187 (3d Cir. 1977):

We do not think that it was the intent of Congress to allow states to shrink the federal remedy for age discrimination by imposing limitation periods shorter than the federal ones. If compliance with Pennsylvania's 90-day filing period is deemed a jurisdictional condition precedent to suit under the ADEA, the federal 180-day limitations period becomes 90 days for residents of Pennsylvania, and the availability of the federal remedy is seriously undermined. *Cf. Olson* v. *Rembrandt Printing Co.*, 511 F. 2d 1288 (8th Cir. 1975) (Title VII). Moreover, any equitable grounds for relaxing the federal limitations period would evaporate if not recognized by the state.

We do not hold that the mere existence of a state limitations period which is shorter than the federal one relieves a plaintiff of his obligation to bring his complaint to the attention of the state authorities. Rather, we hold only that if plaintiff files his complaint with the state agency within the federal 180-day period, the state's conclusion that the filing is untimely under state law will not bar the federal suit. We think this rule is in accord with Congressional intention, consistent with *Goger* and *Rogers*, and compelled by our conclusion that the federal 180-day requirement is itself in the nature of a statute of limitations and subject to equitable modification. 569 F. 2d at 194 (footnote omitted).

APPENDIX D.

ADEA, 29 U. S. C. § 626(d):

No civil action may be commenced by any individual under this section until the individual has given the Secretary not less than sixty days' notice of an intent to file such action. Such notice shall be filed—

> (1) Within one hundred and eighty days after the alleged unlawful practice occurred, or
>
> (2) in a case to which section 633(b) of this title applies, within three hundred days after the alleged unlawful practice occurred or within thirty days after receipt by the individual of notice of termination of proceedings under State law, whichever is earlier.

Upon receiving a notice of intent to sue, the Secretary shall promptly notify all persons named therein as prospective defendants in the action and shall promptly seek to eliminate any alleged unlawful practice by informal methods of conciliation, conference, and persuasion.

ADEA, 29 U. S. C. § 633(b):

In the case of an alleged unlawful practice occurring in a State which has a law prohibiting discrimination in employment because of age and establishing or authorizing a State authority to grant or seek relief from such discriminatory practice, no suit may be brought under section 626 of this title before the expiration of sixty days after proceedings have been commenced under the State law, unless such proceedings have been earlier terminated: *Provided*, That such sixty-day period shall be extended to one hundred and twenty days during the first year after the effective date of such State law. If any requirement for the commencement of such proceedings is imposed by a State authority other than a requirement of the filing of a written and signed

statement of the facts upon which the proceeding is based, the proceeding shall be deemed to have been commenced for the purposes of this subsection at the time such statement is sent by registered mail to the appropriate State authority.

Title VII of the Civil Rights Act of 1964, as amended, 42 U. S. C. § 2000e-5(c):

In the case of an alleged unlawful employment practice occurring in a State or political subdivision of a State, which has a State or local law prohibiting the unlawful employment practice alleged and establishing or authorizing a State or local authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, no charge may be filed under subsection (b) of this section by the person aggrieved before the expiration of sixty days after proceedings have been commenced under the State or local law, unless such proceedings have been earlier terminated, provided that such sixty-day period shall be extended to one hundred and twenty days during the first year after the effective date of such State or local law. If any requirement for the commencement of such proceedings is imposed by a State or local authority other than a requirement of the filing of a written and signed statement of the facts upon which the proceeding is based, the proceeding shall be deemed to have been commenced for the purposes of this subsection at the time such statement is sent by registered mail to the appropriate State or local authority.

Kentucky Fair Employment Practices Act, Sec. 344.040. Unfair Employer Practices. It is an unlawful practice for an employer:

(1) To fail or refuse to hire, or to discharge any individual, or otherwise to discriminate against an individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, national origin, sex, or age between forty and sixty-five. . . .

* * * * *

Sec. 344.200. Filing of Complaint; Efforts to Conciliate. (a) An individual claiming to be aggrieved by an unlawful practice, a member of the Commission, or the Attorney General may file with the Commission a written sworn complaint stating that an unlawful practice has been committed, setting forth the facts upon which the complaint is based, and setting forth facts sufficient to enable the Commission to identify the persons charged (hereinafter the respondent). The Commission staff or a person designated pursuant to its rules shall promptly investigate the allegations of unlawful practice set forth in the complaint and shall within 5 days furnish the respondent with a copy of the complaint. The complaint must be filed within 180 days after the alleged unlawful practice occurs.

* * * * *

(4) If the staff determines, after investigation, or if the Commission determines after the review provided for in subsection (3) that there is probable cause to believe that the respondent has engaged in an unlawful practice, the Commission staff shall endeavor to eliminate the alleged unlawful practice by conference, conciliation and persuasion.

* * * * *

Sec. 344.210. Hearings. (1) Within 60 days after a complaint is filed, unless the Commission has issued an order dismissing the complaint or stating the terms of a conciliation agreement or within 30 days after an application for review is filed under this act, the Commission shall serve on the respondent by registered or certified mail a written notice, together with a copy of the complaint as it may have been amended, requiring the respondent to answer the allegations of the complaint at a hearing. . . .

* * * * *

Sec. 344.230. Dismissal of Complaint. (1) If the Commission determines that the respondent has not engaged in an unlawful practice, the Commission shall state its findings of

fact and conclusions of law and shall issue an order dismissing the complaint. . . .

(2) If the Commission determines that the respondent has engaged in an unlawful practice, the Commission shall state its findings of fact and conclusions of law and shall issue an order. . . .

* * * * *

Sec. 344.240. Judicial Review. (1) A complainant, respondent, or intervenor aggrieved by an order of the Commission, including an order dismissing a complaint or stating the terms of a conciliation agreement, may obtain judicial review, and the Commission may obtain an order of the court for enforcement of its order, in a proceeding brought in the circuit court in a county in which the alleged unlawful practice which is the subject of the order or complaint occurs or in which a respondent resides or has his principal place of business.